88-536

Supreme Court, U.S.
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NO.

SUPREME COURT OF THE UNITED STATES

October Term 1988

BRANKA SCULLIN,

Petitioner,

vs.

MICHAEL MARSTEN,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of California for the Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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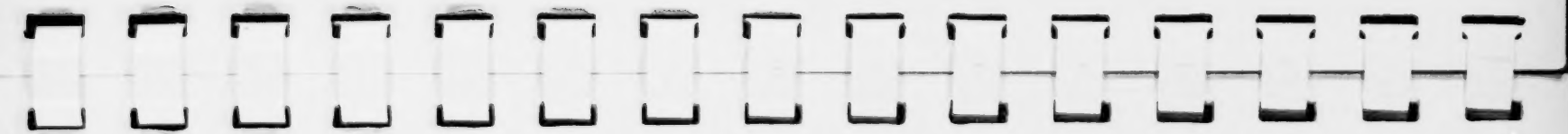

QUESTION PRESENTED FOR REVIEW

1. Whether a state court injunction prohibiting Petitioner from "contacting [Respondent's] neighbors ... and friends,' which neighbors are also former neighbors of Petitioner, and in which prohibition no allowance is made for speech or communication concerning topics other than Respondent, imposes an overbroad restriction of free speech and/or free association protected by the First and Fourteenth Amendments to the United States Constitution, where such injunction was issued in the context of an evidentiary record capable of supporting the conclusion that Petitioner had persistently harassed Respondent on a daily basis by following him and also the conclusion that Petitioner might attempt to defame Respondent?

PARTIES IN THE LOWER COURT PROCEEDING

The parties in the Court of Appeal of the State of California for the Sixth Appellate District are precisely the same two people as are listed in the caption in the instant petition. However, they appear by different names in some of the lower court documents.

The surname of Petitioner is Scullin, although it appears at all places in the record, save one, of the lower courts as Scullen, including on documents prepared by her counsel and in documents signed by her in propria persona, but typed by another. The sole exception appears at the Clerks Transcript - hereinafter "CT" - 19, which is a note sent to the Respondent and typed by Petitioner personally, where the name is correctly spelled as Branka Scullin. Branka Scullin also is

known by the name Barbara Scullin, and was referred to by the first name of Barbara at many points in the record. The Court of Appeals referred to Petitioner as Barbara Scullen.

The surname of Respondent is variously indicated as Marsden and Marsten. The Court of Appeals utilized the former name. But it is the understanding of this counsel that the latter is Respondent's correct name. This understanding is based on the signature of Respondent, the fact that the later documents submitted by counsel for Respondent utilized "Marsten," and by this spelling in the Reporter's Transcript of the trial. Respondent was not asked to spell his name on the record.

No issue in this case is affected by the spelling of either party's name.

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REPORTS OF OPINIONS

The Superior Court for the County of Santa Cruz did not issue a written opinion, although the terms of the order were set out in writing. The Court of Appeal of the State of California for the Sixth Appellate District issued a written opinion in the instant case, which opinion was designated by that court as "NOT FOR PUBLICATION."

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JURISDICTIONAL STATEMENT

The Court of Appeals of the State of California for the Sixth Appellate District issued its opinion on March 24, 1988. A timely Petition for Rehearing was filed with the Court of Appeal on April 8, 1988. A rehearing was denied by the Court of Appeal on April 15, 1988. A timely Petition for Review was filed with the Supreme Court of the State of California on May 3, 1988. The Supreme Court denied the petition for review in a summary order dated **June 8, 1988.**

Subject matter jurisdiction for consideration of review by way of writ of certiorari is conferred by 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution:

First Amendment;

Fourteenth Amendment, Section 1;

California Constitution:

Article I, § 1;

California Code Sections:

Code of Civil Procedure:

§ 527.6;

subsection (d)

§ 1209;

Penal Code:

§ 273.6.

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STATEMENT OF THE CASE

On May 8, 1986 Plaintiff and Respondent MICHAEL MARSTEN (hereinafter MARSTEN) filed in Superior Court of the State of California for the County of Santa Cruz a Petition for Injunction Prohibiting Harassment with an Application for Temporary Restraining Order against Defendant and Petitioner BRANKA SCULLIN aka BARBARA SCULLEN (hereinafter

SCULLIN). (Clerk's Transcript - hereinafter "CT" - 1-5.)

In his supporting declaration (signed May 7, 1986, but filed with the other papers on May 8, 1986) MARSTEN alleged that SCULLIN had been "annoying [his] neighbors, [his] friends, and generally making a nuisance without any legitimate purpose." (CT 3:19-24.) No particular conduct is described in such declaration which would merit this characterization with respect to MARSTEN's friends or neighbors. MARSTEN also stated in said declaration that at the time of his first meeting of SCULLIN "she was acting as a nurse for a neighbor of [MARSTEN's] in Aptos [California]." (CT:18-19.) In said declaration MARSTEN also made various allegations in support of his claim that he was personally subjected to

harassment by SCULLIN, including the following:

> [SCULLIN] thereafter entered into a pattern of conduct which has been virtually unabated for more that six years and which has consisted of following me in both public and private places, sending messages through the mail, ... She has followed me in public places and has refused to leave me alone.
>
> CT 3:19-28.

On that same date (May 8, 1986) Judge Christopher C. Cottle signed an Order to Show Cause and Temporary Restraining Order. (CT 6-7.) Said Temporary Restraining Order included the following provisions directed to SCULLIN:

> Refrain from sending [MARSTEN] messages of any description, whether by regular mail or otherwise.
>
> Refrain from contacting any of [MARSTEN's] friends, employees, or neighbors **for any purpose having to do with [MARSTEN].**
>
> CT 7. Emphasis added.

On May 19, 1986 SCULLIN filed her Response to Petition for Injunction Prohibiting Harassment. (CT 10-11.) In that Response SCULLIN declared as follows regarding the neighborhood of MARSTEN:

> From 1979 to 1981 I lived on the same short street as does [MARSTEN], and thus was in contact with [MARSTEN] and his neighbors. I also vist friends to this day who live on that same short street.
>
> CT 10, item 2c.
>
> I have been deprived of the ability to visit my own friends who live on the same street as [MARSTEN].
>
> CT 11, item 8.

In such document SCULLIN denied that she had followed MARSTEN. (CT 10, item 1b.) SCULLIN therein also asserted her position that MARSTEN had caused her to be terminated from employment (CT 10, item 2a) and that MARSTEN had expressed an "interest" in SCULLIN. (CT 10, item 5.) Finally, SCULLIN consented to an

injunction restraining her as follows:

> a. to not bother [MARSTEN] at his residence. b. to not go to the doors of [MARSTEN's] residence. c. to not send written messages to [MARSTEN]. d. to neither speak directly or by phone to [MARSTEN]. e. to not annoy [MARSTEN's] neighbors. f. to not contact [MARSTEN's] housekeeper. g. to not annoy [MARSTEN's] friends.
>
> CT 10, item 7.

The hearing on said Petition occured on May 21, 1986 before Judge Cottle. (CT 12.) On May 22, 1986 Judge Cottle signed an Order After Hearing on Petition for Injunction Prohibiting Harassment, which was filed that same day. (CT 13-14.) Said May 22, 1986 order included the following provisions restraining SCULLIN:

> Refrain from:
>
> (1) Sending messages to [MARSTEN] through the mail;
>
> (2) Contacting [MARSTEN's] neighbors, housekeeper and friends.
>
> CT 14.

On March 6, 1987 MARSTEN filed a Petition for Amended Injunction Prohibiting Harassment against SCULLIN in the same case. (CT 15-17.) On the same date MARSTEN presented to the Superior Court an Order to Show Cause In Re Contempt and to Modify Existing Injunction. (CT 22-23.) A declaration in support of the petition for amended injunction and contempt citation was filed by MARSTEN (CT 18[1]-19). With respect to SCULLIN's conduct in relation to his friends and neighbors, MARSTEN alleged the following:

> I continue to reside at 735 Los Olas Drive, Aptos, a dead end road located to the west of Seacliff Beach State Park, the only access

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1. The page between pages 18 and 19 in the Clerk's Transcript is unnumbered, but clearly is the second page of the Declaration of Plaintiff in Support of Contempt and Amendment Proceedings, which begins on page 18. Reference to this page will be as page 18A of the Clerk's Transcript or "CT 18A."

> to my residence. ... [SCULLIN] has on a regular basis parked her vehicle in the public parking areas in Seacliff State Beach at various times during the day and night. Her presence has thus been made known to friends and visitors to my home. On or about February 16th [SCULLIN] made verbal threats to a friend who was visiting my home, and is currently being processed through the office of the District Attorney.
>
> CT 18:21-18A:5.

Nowhere in the record are the contents of the "verbal threats" explicated or any of the circumstances surrounding such alleged incident indicated. MARSTEN reported that SCULLIN had sent him a note which referred to their possible marriage or cohabitation and assuring him that she would disclaim an interest in his wealth. (CT 18A:6-11; CT 19). MARSTEN also alleged that "in recent months" SCULLIN had followed him as he traveled in his vehicle to the store and post office. (CT 18:13-25.)

The Order to Show Cause was signed on March 6, 1987 by Judge William M. Kelsay, and filed that same date. (CT 22-23.)

The consolidated hearing regarding the petition for amended injunction and the contempt charge occurred on March 31, 1987 before Judge Kelsay. (CT 26.) MARSTEN was represented by Austin B. Comstock; SCULLIN was represented by Raymond C. Grueneich.

There was no testimony regarding the contacts of SCULLIN with friends or neighbors of MARSTEN at the hearing, except for a brief allusion in which MARSTEN identified a particular event as occuring "right after [SCULLIN] had terrorized [MARSTEN's] girlfriend." (Reporter's Transcript - hereinafter "RT" - 20:7-9.) Presumably, this was a reference to the "verbal threats" said

to have occurred on or about February 16, 1987. (At the conlusion of the hearing during the discussion as to the scope of the amended injunction, MARSTEN made the following remarks to the trial court:

> MARSTEN: I'm particularly upset. She has threatened my girlfriend, whose name I really don't even want to bring up, because I'm afraid of, you know, that she might --"
>
> SCULLIN (interrupting): I never --
>
> MARSTEN: And this has happened a number of times. And I fear for her life sometimes.
>
> RT 51:23-52:3.

With respect to harassment of MARSTEN himself, MARSTEN testified that SCULLIN followed him "every day." (RT 7:25-8:3.) MARSTEN also testified that he had received hundreds of letters from SCULLIN. (RT 19:14-16.) However, there was no testimony that any of these letters except for the one appearing at

CT 19 had been received since the May 8, 1986 Temporary Restraining Order. MARSTEN testified that "this has been going on seven and a half years or something like that." (RT 20:3-4.)

Mr. Smeenk, a building contractor, testified that he had done work for MARSTEN "over a period of years." (RT 21:3-5.) Apparently, Smeenk's hearsay testimony that his (Smeenk's) brother had reported to him that various calls had been received by the brother from SCULLIN asking for Smeek to contact her was struck by the trial court. (RT 22:5-23:22.) Even if we suppose that such testimony was not struck, there was no suggestion that the topic of MARSTEN was ever mentioned by SCULLIN.

Following the case in chief SCULLIN elected to testify at such hearing.

(CT 26.) SCULLIN denied that she had ever followed MARSTEN. (RT 25:25-26; 32:4-5; 46:3-4; 46:7.) SCULLIN did acknowledge that she had parked her car in the Seacliff State Park parking lot, and gave her explanation as to why she did so. (RT 26:16-17; 28:2-14; RT 28:23-29:3.) SCULLIN reiterated that she used to live on that street. (RT 28:2.) SCULLIN further denied that she had ever threatened MARSTEN's girlfriend. (RT 52:7-9.) SCULLIN testified that she had "overheard or somebody told [her]" that MARSTEN preferred SCULLIN over his girlfriend. (RT 33:6-10.) SCULLIN acknowledged that she does "care about [MARSTEN]" and has "some kind of profound feeling for [MARSTEN]" (RT 31:11-14.) She attributed this feeling to her purported knowledge that MARSTEN is an alcoholic, a drug user, and a

wealthy man and this has resulted in her having "some kind of sympathy for [MARSTEN]." (RT 31:15-20.) SCULLIN also testified that MARSTEN was "a paranoia [sic]." (RT 33:25-26.) SCULLIN also acknowledged that she had sent MARSTEN "that note," which presumably refers to the note found at CT 19. (RT 33:13-14.) SCULLIN also claimed to know that MARSTEN was "influenced by his friends." (RT 33:4-5.)

Judge Kelsay unequivocally gave credence to MARSTEN's version of the events. (RT 50:24-26.) Judge Kelsay also characterized SCULLIN's conduct as "outrageous," (RT 41:18) and announced that MARSTEN "is entitled to his peace of mind." (RT 40:10-13.) SCULLIN was found guilty of the contempt charge. (CT 27-28.) Judge Kelsay also expressed his opinion that SCULLIN was mentally ill.

(RT 52:26-53:5.)

There was also discussion concerning the proper scope of the amended injunction. Comstock requested that all of the terms of the previous injunction continue in effect, and that new restrictions be added concerning the vicinity of Seacliff State Park, the Aptos Post Office and the Rancho Del Mar Shopping Center. In one particular Comstock argued for a continuation of the order that SCULLIN not have "[c]ontact with other people having direct contact with [MARSTEN]." (RT 50:2-7.) Grueneich and Judge Kelsay then had the following exchange regarding this request:

> GRUENEICH: The concern I have with those just iterated is some of the vagueness about "with friends ..." and et cetera. and I think it's illustrated with what happened this morning.
>
> JUDGE KELSAY: But you see, Mr.

Grueneich, these people, according to [MARSTEN's] representations, have no friends in common, no reason for contact directly or indirectly. And I have every reason to believe that [MARSTEN is] telling me the absolute hundred and ten percent truth.

GRUENEICH: Well, let me illustrate what I'm concerned about. For example, the contractor who took the stand. And he stated that his business was contacted, and apparently he's a friend of Mr. Marsten. Apparently that was being offered or was to be one of the bases of the claim that she was making contacts with [Marsten's] friends, because [SCULLIN] makes contact or allegedly made contact to the office of a contractor.

I don't think that that would be adequate notice that that kind of conduct is -- you can make contact with a business, that that's a violation of the section.

JUDGE KELSAY: I don't disagree. All I'm saying, she has no reason to contact anyone that he knows, does she?

GRUENEICH: That she knows he knows.

JUDGE KELSAY: Yes. Does she? In fact if she does, everything else about her is suspect with respect to her obeying the Court's orders. Which[,] by the way, are constitutionally acceptable, Miss

[sic] SCULLIN. I don't disagree with you with respect to that.

RT 50:17-51:20.

There was a final exchange between the trial court and SCULLIN which reflects that court's view on the scope of the order at issue:

SCULLIN: Judge, I never threatened his girlfriends on any time. I swear in God. Never threatened that woman. She threatened me two years ago. I didn't know her. ... And I saw him with her once and I just said, "Hi, Paula."

JUDGE KELSAY: Why did you say "Hello" to her?

SCULLIN: Well, I know [MARSTEN] --

JUDGE KELSAY: Why did you say "Hello" to her? Because you know him?

SCULLIN: I'm just curious to talk because she know him. She yell from the car and said, I'm going to have Michael to arrest you.

RT 52:7-21.

An Order After Hearing on Petition for Injunction Prohibiting Harassment was signed by Judge Kelsay and filed on

May 5, 1987. CT 29-30. The May 5, 1987 order included the following provisions restraining SCULLIN:

> [SCULLIN] shall refrain from
>
> (1) sending messages to [MARSTEN] through the mail;
>
> (2) contacting [MARSTEN's] neighbors, housekeeper and friends;
>
> (3) being 100 yards from the entry of Seacliff State Park;
>
> (4) refrain from being within the boundary of Seacliff State Park, Aptos, California;
>
> (5) refrain from being at the Aptos Post Office of the Rancho Del Mar Shopping Center after the hour of 10:30 a.m.;
>
> CT 30.

SCULLIN filed a Notice of Appeal on May 29, 1987 from the "ORDER AFTER HEARING ON PETITION FOR INJUCTION [sic] PROHIBITING HARRASSMENT [sic] entered

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herein on May 1[1] [sic], 1987." CT 31.

SCULLIN briefed[2] issues concerning both said May 5, 1987 order and the contempt conviction. The challenge of the amended injunction in the Appellant's Opening Brief included various statutory and constitutional grounds. In the latter category were the contentions that the injunction in prohibiting SCULLIN from "contacting

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1. The order at issue was filed on May 5, 1987. It is not clear when Judge Kelsay signed it, although the Court of Appeal incorrectly surmised it to be on May 1, 1987. May 1, 1987 is the date upon which Grueneich "[a]pproved [the May 5, 1987 order] as to form and content, 1987. CT:31. The May 1, 1987 date was initially entered in the space for the date corresponding to the Judge's signature by Grueneich, and then crossed out and reinserted below in the date space corresponding to counsel's signature.

2. At the time of the briefing and oral argument (until the Petition for Rehearing) SCULLIN appeared in propria persona, but was informally assisted in that endeavor by another attorney, Derek Albertson.

[MARSTEN's] friends, housekeeper, and neighbors" was impermissibly vague and overbroad. These points were argued as follows:

A. THE ORDER IS VOID FOR VAGUENESS

> The order under appeal restricts [SCULLIN's] right to "contact friends, housekeeper and neighbors" R.T. 30. this specific language has been declared constitutionally improper as vague and overbroad.
>
> The "portion of the trial court's order prohibiting [Defendant] from 'contacting' any of the residents of the mobilehome park is also infirm as unconstitutionally overbroad, because its vague wording appears to prohibit lawful as well as unlawful activity. That is, it could be interpreted to prohibit not only physically or verbally threatening 'contact,' but also constitutionally protected speech. [citations]." Smith v. Silvey (1983), 149 C.A.3d 400, 406-407; 197 C.R. 15.
>
> The classification "friends, housekeeper and neighbors" is undefined and without objective limits. If [MARSTEN] mingles with local Chamber of Commerce, making friends, does that mean that [SCULLIN] is prohibited from

attending Chamber of Commerce public meetings. The classification of friends is malleable and changing. Even the concept of "neighbor" includes a wide variety of persons depending on the light of interpretation.

B. THE ORDER ON APPEAL IS OVERBROAD AND FAILS TO MEET THE BALANCE TEST.

The order subject to this appeal prohibits lawful as well as unlawful activity. "An injunction, like a statue, may be attacked under some circumstances as unconstitutionally over-broad if it prohibits lawful as well as unlawful activity. [citations]." California Retail Liquor Dealers Institute v. United Farm Workers (1976), 57 C.A.3d 606, 129 Cal. Rptr[.] 407.

The court uses a balance test in evaluating the legality of an order. "[A] court must weight [sic] the extent of the impairment against both the importance of the governmental interest and the substantiality of the threat which the forbidden speech or related activity poses to that interest." L. A. Teachers Union v. L. A. City Board of Education (1969), 71 C.2d 551, 556; 78 Cal.Rptr. 723.

The legitimate purpose of the order is to protect [MARSTEN] from harassment from [SCULLIN]. It legitimately forbids direct harassment and illegal activity but

goes on to prevent contact with an unspecified set of person[s] labeled as "friends and neighbors." In fact, that group was never specified nor its size determined. Dos [sic] [MARSTEN] have 10, 100, or 1000 friends in this county? If [MARSTEN] is a public person, or becomes one during this [sic] effective period of this order (which could be decades), he could have friends to the extent that [SCULLIN] could hardly avoid them in the regular course of her life. In fact, [SCULLIN] doesn't know who are [MARSTEN's] friends.

C. THE ORDER UNDER APPEAL IMPROPERLY INFRINGES UPON THE FREE SPEECH RIGHTS OF [SCULLIN]

The prohibition includes all "contact" with certain groups of persons. "It could be interpreted to prohibit not only physically or verbally threatening [']contact,['] but also constitutionally protected speech." Smith v. SilveyS [sic] (1983), 149 C.A.3d 400, 407; 197 Cal. Rptr[.] 15.

This order attempts to prohibit any contact with "Friend," whether political, religious or plain harassment by [SCULLIN]. This order intends to limit SCULLIN's]'s right of speech under the U.S. Constitution and the California Constitution.

In order to impair a

person[']s First amendment rights, a balance must be made. That balance requires that a "clear and present danger" must be found. Smith, 149 C.A.3d 400, 407. The transcript reveals no such finding that contact with the friends of neighbors would constitute such a danger, or any danger at all. Do [SCULLEN's] activities "constitute a 'serious substantial evil' to a right or interest having equal dignity and protection with First Amendment liberties." Smith v. Silvey (1983), 149 C.A.3d 400, 407.

D. THE ORDER APPEALED FROM VIOLATES [SCULLIN'S] CONSTITUTIONAL RIGHT OF ASSOCIATION.

It is hornbook law that the U.S. constitution protects the right of association. The order under appeal prohibits [SCULLIN's] association with those who might otherwise associate with [SCULLIN]. [MARSTEN's] involvement with any group would act to automatically eject [SCULLIN's] association with that group EVEN IN [MARSTEN's] ABSENCE. [SCULLIN] would have to assume that [MARSTEN] made "friends" within that group in order to avoid violation of the order.

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E. THE RIGHT OF FREE SPEECH INURES TO THE BENEFIT OF BOTH THE SPEAKER AND THE LISTENER AND RESTRICTIONS WITHOUT REQUEST OF RESTRICTIN [sic] BY LISTENER, IS VOID

> This order prohibits such protected speech with persons that have never complained to the court, or even know about this order at all. This order violates their right to hear protected speech from [SCULLIN]. Free speech runs both ways, protecting the speaker and the listener.
>
> The order preemptively denies [SCULLIN] her right of speech to persons BEFORE they complain. This situation has been addressed by the court and struck down as a violation of the First Amendment guarantees. Alternatives for California Women, Inc. vs. County of Contra Costa (1983) 145 C.A.3d 436, 449-450; 193 Cal. Rptr. 384.
>
> Appellant's Opening Brief (AOB). 8:17-12:15

On behalf of MARSTEN, Comstock filed a Respondent's Brief -"RB"- with the Court of Appeal in which the constitutional overbreadth and vagueness contentions of SCULLIN were addressed on their merits. (RB 9:8-10:19; 11:21-

12:14; 12:21-13:9.)

The Court of Appeal declined to adjudicate any issue concerning the contempt conviction. (Opinion of the Court of Appeal - "OP" - fn. 2.) The Court of Appeal treated the appeal as having been taken from the order of Judge Kelsay filed May 5, 1987 with an unpublished opinion filed March 24, 1988. (OP Fn 2) The Court of Appeal addressed the merits of both the vagueness and overbreadth objections to the item concerning prohibition of contact with MARSTEN's "friends, housekeeper, and neighbors" as follows:

> [SCULLEN's] principal contentions concern that portion of the injunction prohibiting her from "contacting [MARSTEN's] neighbors. housekeeper and friends."
>
> She argues the order is void for vagueness and overbreadth because the wording appears to prohibit lawful as well as unlawful activity and because the forbidden group is undefined. We disagree.

An injunction is fashioned to meet the circumstances of a particular case and need not be judged by the same standards employed in determining the validity of a statute. (California Retail Liquor Dealers Institute v. United Farm Workers (1976) 57 Cal.App.3d 606, 610.) Because [SCULLIN's] past conduct consisted of initiating social intercourse with persons known to be acquainted with [MARSTEN], there is no danger of misinterpreting what behavior is prohibited by the challenged order.

This case is unlike Smith v. Silvey (1983) 149 Cal.App.3d 400, 406-407. There, the defendant's past conduct consisted of petitioning the government for redress of grievances. Since this is constitutionally protected activity, the injunction prohibiting defendant from "contacting" residents was infirm for failing to differentiate between constitutionally protected contacts and harassing contacts.

Making unwanted indirect contact with someone through his friends and neighbors is not the exercising of one's right to free speech or association. It is harassment as defined in [CCP] section 527.6, and it is the very activity prohibited by the injunction in this case.

OP 3-4.

The Court of Appeal affirmed the May 5, 1987 order of the Superior Court. (OP 5.)

SCULLIN then returned to Grueneich, who filed a Petition for Rehearing with the Court of Appeals on April 8, 1988. The Petition for Rehearing pointed out that the Respondent's Brief had misled the Court of Appeals by suggesting that the terms of the order at issue were the same as the terms of the original restraining order, and that the order thus still contained the qualification that only contact "for any purpose having to do with [MARSTEN]" was enjoined. The Petition for Rehearing invited the Court of Appeal to modify the instant order to include such phrase and thus remove the particular overbreadth problem. (Petition for Rehearing - "PH" - 6:4-15.) Said

Petition for Rehearing was denied on April 15, 1988, with the suggested modification not being made.

A timely Petition for Review was filed with the Supreme Court of the State of California on May 3, 1988 by SCULLIN with Grueneich as counsel. The overbreadth issue raised here was expressly raised and briefed in said Petition for Review as follows:

> 3. THE ORDER OF THE SUPERIOR COURT RESTRAINING [SCULLIN] FROM HAVING ANY CONTACT FOR ANY PURPOSE WITH ANY FRIENDS OR NEIGHBORS OR [sic - OF] [MARSTEN], IS OVERBROAD AND THUS IS A VIOLATION OF THE RIGHTS OF FREE ASSOCIATION PROTECTED BY (a) THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, (b) ARTICLE I, § 2(a) OF THE CALIFORNIA CONSTITUTION, AND (c) THE PROPER EXERCISE OF EQUITABLE DISCRETION.
>
> If, contrary to the contentions presented in the two preceding arguments, the Court is of the view that the trial court could have restrained [SCULLIN] with respect to her association with third parties who had not requested any relief from her communiciation, then [SCULLIN]

contends that the particular form of the injunctive relief granted is constitutionally overbroad in violation of the First Amendment to the United States Constitution and Article I, § 2(a) of the California Constitution, and sound principles of equitable discretion.

Although it is acknowledged that constitutional rights of association are not absolute, it is established also that they may not be impinged any further than is required to protect the particular interests found to be sufficiently compelling to warrant their limitation. United States v. Robel (1967) 389 U.S. 258, 19 L.E.2d 508, 88 S.Ct. 419; Baird v. State Bar of Arizona (1971) 401 U.S. 1, 27 L.Ed.2d 639, 91 S.ct. 702; Healy v. James (1972) 408 U.S. 169, 33 L.Ed. 266, 92 S.Ct. 2338.

The only privacy interest that [MARSTEN] has at stake with respect to third parties is that [SCULLIN] should not use those third parties to attempt to convey messages to him. It is also arguable, but not conceded by [SCULLIN], that [MARSTEN's] reputational interests to be protected from defamatory statements to his friends and neighbors also could be protected by a CCP § 527.6 proceeding. It is clear that all that is necessary to protect both of these interests is a proscription on communicating with such third parties in any manner regarding **the topic of**

[MARSTEN]. There is no justification whatsoever as to why [SCULLIN] should be restrained from conversation with her former neighbors about other topics not relating to [MARSTEN]. Under the current order she is restrained from having a completely innocent conversation with a former neighbor whom she happens to meet shopping. This was the limitation contained within the original May 8, 1986 temporary restraining order. However, such limitation was deleted from the 1986 and 1987 permament orders. Without such limitation, the injunction is constitutionally and equitably overbroad in the extreme. Social conversation on sundry topics is part of the freedom of association and free speech that is given constitution protection.

It might be argued that the only way to prevent her from discussing [MARSTEN] to such people is to prevent her from communicating at all. There is absolutely no reason to believe that such third parties would not be completely candid about the topic of conversation. That being the case, [SCULLIN] is going to be deterred as effectively by the more limited order as the more complete order.

Petition for Review -"PR" - 24:1-25:23. (Emphasis in original.)

The California Supreme Court denied the

petition for review in a summary order dated June 8, 1988.

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ARGUMENT

I. THE OVERBREADTH ISSUE IS PROPERLY BEFORE THIS COURT.

There are two possible obstacles that could preclude review of the overbreadth issue by this Court, and they are both surmounted on this record.

First, it is to be noted that the particular term of the May 5, 1987 injunction order objected to is precisely the same as was contained in the May 22, 1986 injunction order, although significantly different than that which appeared in the May 8, 1986 temporary restraining order. Such being the case, it is pertinent as to whether the merits of such controversy can be addressed on a direct review of the 1987

injunctive order when no appeal was taken from the 1986 injuctive order containing the same provision. This procedural question is strictly governed by California law and is not properly adjudicated in this forum. Whatever the correct answer to such question is in the abstract, it was answered concretely in the instant case by the California Court of Appeals for the Sixth Appellate District, the highest court of California in which review was able to be had. That answer was impliedly given in the affirmative when the various challanges to the provision of the injunction pertaining to contact with the neighbors and friends of MARSTEN were addressed on their merits, with no suggestion that there was a procedural obstacle. Indeed, this occurred in an opinion which refused to review the

issues relating to the contempt conviction by reason of procedural defects in the form of presentation. Cf., Taylor v. Kentucky, 436 U.S. 478, 482, fn. 10, 56 L.Ed.2d 468, 473, 98 S.Ct. 1930 (1978).

The second obstacle concerns the adequacy of the record below concerning the overbreadth objection. Concededly, the trial record on this point is relatively obscure. It can be gleaned from the reference during the discussion of the scope of proper relief to the "vagueness" of the provision. (RT 50:17-19.) Although the word "overbroad" was never used in the trial court, reference to the "vagueness" of the phrase "contact with neighbors ... and friends" may be taken to raise an overbreadth issue, as is illustrated in the following excerpt from Smith v. Silvey,

149 Cal.App.3d 400, 406-407, 197 Cal.Rptr. 15 (1983):

> The second portion of the trial court's order prohibiting Silvey from 'contacting' any of the residents of the mobilehome Park is also infirm as unconstitutionally overbroad, because its vague wording appears to prohibit lawful as well as unlawful activity.

However, here again, this is not a matter to adjudicate in a federal forum when the state appellate system has indicated that it is satisfied that the question is adequately preserved for its determination on the merits. Taylor, supra. As the appellate briefs and opinion clearly indicate, especially by the discussion of Smith v. Silvey, 149 Cal.App.3d 400, 197 Cal.Rptr. 15 (1983) in that opinion, the overbreadth issue was resolved by the Court of Appeal on its merits. the Court of Appeal did not consider the kind of speech which SCULLIN might have with MARSTEN's

friends and neighbors on topics other than MARSTEN to be protected by the First Amendment or other authority binding on that court.

II. THE PROHIBITION AGAINST "CONTACTING RESPONDENT'S NEIGHBORS ... AND FRIENDS" IS AN OVERBROAD ENCROACHMENT OF PETITIONER'S RIGHTS OF FREE SPEECH AND ASSOCIATION.

An injunction against anyone, including one who has been found by a Court to have harassed another, requiring the one person to refrain from "contacting the neighbors ... and friends" of the other, is a species of prior restraint. "Any system of prior restraint ... comes to this Court bearing a heavy presumption against its constitutional validity. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 9 L.Ed.2d 584, 83 S.Ct. 631, 639

[(1963)]." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558, 43 L.Ed.2d 448, 95 S.Ct. 1239, 1246 (1975). However, under necessitating circumstances, certain forms of prior restraint are compatible with the First Amendment. Times Film Corp. v. City of Chicago, 365 U.S. 43, 5 L.Ed.2d 403, 81 S.Ct. 391 (1961). Thus it is necessary to analyze the nature of the prior restraint, the nature of the interests purportedly served by the prior restraint, and the nature of the alternatives to the prior restraint.

Unlike the classical instances of prior restraint illustrated by cases such as Near v. Minnesota ex rel Olson, 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931), and Lovell v. Griffin, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938), the instant case does not

implicate the spector of prospective censorship unguided by explicit and delineated standards. But censorship is not the only harm caused by prior restraint. All forms of prior restraint involve an actual or potential restraint on either the nature of expression or the opportunity for expression or both, as well as a limitation on what is heard or seen by at least a certain audience.

The nature of the prior restraint in the instant case is very much akin to that presented in Organization for a Better Austin v. Keefe, 402 U.S. 415, 29 L.Ed.2d 1, 91 S.Ct. 1575 (1971). The two cases have in common the fact that with respect to a distinct audience there was a significant interference with the ability to communicate. Although the extent of the forbidden audience was greater in Organization for

a Better Austin, in that it encompassed the entire city limits of Westchester, Illinois, the intensity of the ban is greater in the instant case, in that it is a total ban on communication, and not merely a prohibition against picketing and the distribution of written literature. SCULLIN is not free, as were the opponents of blockbusting in Organization for a Better Austin to make telephone calls to the intended audience. There are two other respects in which the two cases are quite parellel. In each, the person(s) subject to the injunction were from "outside" the target area, and thus were thought not to have as legitimate a claim to the audience as one who might live there. Actually, that factor is considerably diluted in the instant case, in that SCULLIN used to live in

the area and thus many of the people involved are her former neighbors, and one is her former employer. The other common factor, of much greater importance, is that in each case, the prior restraint was supposedly justified by the necessity of protecting the right of privacy of a particular individual. While Keefe was entitled to his personal privacy in his own home, this Court held that he was not entitled to utilize judicial prior restraint to keep his neighbors isolated from what negative comments political activists from an outside community might tell them about him. As will be both acknowledged and developed, both the privacy interests and the permissible constraints on free expression are distinguishable between the two cases. But one principle that Organization for Better Austin does

establish is that the interest of an individual in his reputation among his neighbors does not by itself justify the use of prior restraint of those who might choose to detract from that reputation to that audience.

Before completing the comparison between Organization for Better Austin and the instant case, it is well to note the comparison which Chief Justice Burger made between that case and Rowan v. United State Post Office Dept, 397 U.S. 728, 25 L.Ed.2d 736, 90 S.Ct. 1484 (1970). Rowan involved a form of prior restraint that was found acceptable to this Court. The crucial factor is that Rowan involved the restriction of material into the home of those individuals who had **personally** expressed their unwillingness to receive such materials and that it was accomplished

through a scheme that did not involve governmental censorship. Keefe, on the other hand, attempted to keep information and materials from his neighbors. Rowan was but the implementation of the principle of privacy that honors the right of a person to voluntary remove themselves, at least while in private places, from an audience that is otherwise available to the speaker, writer or artist. This principle was long ago expressed by this Court in the context of labor relations in American Steel Foundries v Tri-City Central Tradfes Council, 257 U.S. 184, 204, 66 L.Ed. 189, 42 S.Ct. 72, 77, 27 A.L.R. 360:

> How far may men go in persuasion and communication and still not violate the right of those whom they would influence? ... We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information

> with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free ....

Cf. Babbitt v. United Farm Workers National Union, 442 U.S 289, 60 L.Ed.2d 895, 99 S.Ct. 2301 (1979). These principles are applicable to communication on virtually all topics interactions and provide the main line of reconciliation between the First Amendment right of expression and the penumbral constitutional right of privacy, that in California is given express and exalted status as an "inalienable right" by Article I, § 1, of that State's Constitution. The resolution of this case along the lines

suggested in this Petition does not require any denigration whatsoever of the right of privacy. The instant case provides an excellent opportunity to delineate some important boundaries between Rowan and Organization for a Better Austin, for its facts, as found by the trial court, fall between them.

Like the householders wanting to be free of smut mail or junk mail, or both, whose rights of privacy were deferred to in Rowan, MARSTEN wants to be free of unwanted intrusion in his personal life, especially while in his home. The pedestrian aspects of the injunction give him most of that, for example, the restraining of SCULLEN from his person and his home, and after the amended injunction, even from the vicinity of his neighborhood. But he also wishes to be free of communications from SCULLEN

via third parties, and the trial Court found that there was a realistic basis for such concern. If SCULLIN were to utilize a friend or neighbor to communicate a message to MARSTEN, after MARSTEN has so clearly expressed his desire to be free of such communication, then concededly such a message would be more than a First Amendment exercise of expression; it would be a "verbal act" amounting to harassment. As a "verbal act" it would be susceptible to injunction. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439, 55 L.Ed. 797, 31 S.Ct. 492, 497 (1911). By reason of this facet, the instant record supports a prior restraint on such communication as SCULLIN might desire to make to the neighbors and friends of MARSTEN that would be of such a nature as to be susceptible to be transmitted

to him as coming from her. It is also in this regard distinguishable from an injunction against defamation, which is not necessarily the restraining of a mere "verbal act," but rather implicates the kind of censorship concerns highlighted in Near, supra.

However, once the prior restraint is broadened to include communications of the sort that are not likely to be conveyed to MARSTEN as coming from SCULLIN, then we have crossed the road to Organization for a Better Austin. At that point, MARSTEN, like Keefe before him, is controlling what extraneous communication may be conveyed to his neighbors, instead of merely protecting his own privacy. Indeed, MARSTEN has far less legitimate interest in doing so than Keefe, who had a significant reputational interest at stake in

shielding his neighbors from the outside agitators. While the prior restraint could not be justified on the ground of protecting MARSTEN's reputation in the eyes of his neighbors, nonetheless the limited forms of prior restraint which are acknowledged as being proper in this Petition have the incidental effect of accomplishing precisely what Keefe wanted to accomplish in his case, i.e., protection of his personal reputation. MARSTEN thus has no interest whatsoever in cutting off other topics of conversation except as it may provide a wider zone of isolation to prevent any breaches of his legitimate privacy interests. That extra feeling of security, it is submitted, cannot be purchased at the high cost of a portion of SCULLIN's remaining First Amendment rights. The conduct attributed to her

by the trial court has cost her in terms of her freedom of movement, and thus to a significant extent, to her freedom of expression. But it is a cardinal principle of the First Amendment that even when encroachments on such liberty are necessitated, that they may extend no further than required under the totality of the circumstances. United Steelworkers of America v. Sadlowski, 457 U.S. 102, 111, 72 L.Ed.2d 707, 715, 102 S.Ct. 2339, 2345 (1982); Brown v. Hartlage, 456 U.S. 45, 53-54, 71 L.Ed.2d 732, 102 S.Ct. 1523, 1529 (1982); Elfbrandt v. Russell, 384 U.S. 11, 16 L.Ed.2d 321, 86 S.Ct. 1238 (19__). This principle was succinctly expressed by this Court in Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 183-184, 21 L.Ed.2d 325, 89 S.Ct. 347, 353 (1968):

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.

Another feature that likens the instant case to Organization for a Better Austin is that the record fails to show that the audience that has been cut off has in any way concurred that they should not receive communication from the particular source sought to be avoided by the litigant. It is not necessary that the neighbors or friends become parties to the case to accomplish this. For example, had a particular neighbor, or his girlfriend, wished to be rid of all communications from SCULLIN of any nature whatsoever, they could have evidenced that intent with an affidavit, or perhaps even a simple note, thus putting them on the same

plane as the householder in Rowan. It is appreciated that in some instances, there may be a fear of disclosing identity, but that need not be an obstacle. The litigant can show good cause regarding the third person's fear or reluctance to be identified by name, and offer the affidavit or note under seal for the court to examine in camera. But the auditors must be consulted in some fashion and not be completely disregarded.

MARSTEN does not have a valid privacy interest in not being indirectly influenced by SCULLIN in any manner whatsoever, but only in not being influenced in a way that abrades him with her identification. For example, were SCULLIN to inspire a particular friend of MARSTEN's with the vaunted virtues of a particular political

candidate, and if, **without suggestion of SCULLIN**, that friend should subsequently persuade MARSTEN to the same view, then First Amendment communication would have run full circle between them without any violation of privacy. The same would be true if SCULLIN advised the same intermediary of a sale on a fruit or vegetable in season, and this consumer information were passed on to MARSTEN entirely on the initiative of the third party.

This case is an important one to review for yet another reason. Most cases that deal with the subject of free speech or free press concern speech or writing that is either political, religious, or purports to have some literary or artistic value. Recently, there has been some focus on commercial speech as well. But the time is nigh

that the banal speech of the common citizen on the ordinary affairs of life be recognized as a form of speech worthy of First Amendment protection.

This brings us to the topic of freedom of association. Roberts v. United States Jaycees, 468 U.S. 609, 82 L.Ed.2d 462, 104 S.Ct. 3244 (1984), analyzes the nature of association on a scale that ranges from intimate association, such as that involved in Griswold v. Connecticut, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965), to organizational association for the advancement of political goals, such as that involved in National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958). This case focuses on an intermediate form of association that has aspects of both the intimate

and the social: the relation of neighbor to neighbor. It can range from the most aloof to cordial to one of warm affection. If SCULLIN is required to shun, without explanation, a former neighbor whom she should happen to meet in a store, the effect is not one of no communication. The actual effect is one of sundering an association or relationship, because that person is likely to impute a negative, and erroneous, miscommunication to the refusal to merely chat. It is commonplace in the courtroom of a conscientious trial judge to have that judge remind jurors, along with the admonition to refrain from discussing the case or speaking with anyone involved in the case, that if a lawyer spurns the most innocent remark or inquiry entirely unrelated to the case,

it is not because of rudeness or hostility, but rather because of strict conformity to the rules of court. BRANKA SCULLIN is not permitted the benefit of a parellel advisement. She merely suffers the impact of the distorted message, and the hurt feelings of a damaged relationship. Such should not be imposed without a demonstrable and compelling necessity.

Finally, there is a growing, and proper, tendency in modern America to utilize the sanction of the Courts to protect personal privacy and security, especially in post-marital circumstances or in situations in which one erstewhile lover is unwilling to let the other go their way. Increasingly, these are no longer being disregarded as mere domestic quarrels. They are being recognized as real threats to personal

dignity and the public peace, as well as detrimental to any children that may be involved on the scene. A great deal of irrationality can accompany such situations, and, of course, mental illness and/or intoxication can compound the problem. Although the instant situation seems more bizarre in that it is not in the wake of a consummated relationship, the remedial problems are not alien to an extremely large number of cases. Given the emotional intensity and frustrations often present in such cases, trial judges will often be tempted to resort to drastic measures. Sometimes such measures are entirely necessary. However, there is presently a dearth of authority on the impact of First Amendment values on setting the limits to remedies in this area. This case could offer one very helpful

guideline to that task.

It should also be noted that the sanctions behind the particular prior restraint in this case are not slight. Violation of the court's injunction can result in a criminal prosecution by the County District Attorney pursuant to California Penal Code § 273.6, with a six month jail term and an $1,000.00 fine as a possible punishment for each count, or in the alternative, it can result in a prosecution by the opposing private party, such as occurred here, pursuant to California Code of Civil Procedure § 1209, with a possible jail term of five days and a $500 fine for each count. Furthermore, the injunction can be renewed. California Code of Civil Procedure § 527.6(d).

Dated: September 6, 1988.

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Philips B. Patton